

LIQUOR VENDOR LIABILITY FOR INJURIES CAUSED BY INTOXICATED PATRONS—A QUESTION OF POLICY

Since the repeal of Prohibition in 1933 the liquor business has been one of the most closely regulated industries in this country. Most states devote an entire chapter of their statutory code to liquor control, and the federal government exercises further regulation through a liquor excise taxation scheme. No other category of consumer products is subject to the level of direct legislative regulation that is confronted by the liquor business.

Nevertheless, during the past fifteen years a number of courts have decided that the statutory controls on the liquor industry at the retail level are not sufficient to protect the public from the evils of intoxication, and have looked to the common law for additional constraints. The motivation behind this search has come from the frequency and severity of automobile accidents caused by intoxicated drivers.¹ Because courts must deal with the grisly consequences of intoxicated drivers in the tort suits which follow the accidents, they are more likely than the legislatures to directly confront situations in which it would seem desirable to impose tort liability on a liquor vendor for injuries caused to a third party by an intoxicated person.

However, the common law has traditionally been that an injury to a third party caused by an intoxicated person is not actionable against the vendor who sold liquor to the intoxicated person because the sale was only a remote, and not a proximate, cause of the injury.² This common law rule has arisen from the normative assumption that a person should not be able to relieve himself from responsibility for his acts by becoming intoxicated,³ and from the further assumption that it is not a tort to sell liquor to an able-bodied man, since the liquor vending business is legitimate and the purchaser is deemed to be responsible.⁴

¹ Note that in most of the cases discussed *infra* the injuries complained of were sustained in automobile accidents.

² The consumption of the liquor is usually considered to be the proximate cause of the injury. *Mason v. Roberts*, 33 Ohio St. 2d 29, 33, 294 N.E.2d 884, 887 (1973); *Christoff v. Gradsky*, 140 N.E.2d 586 (Ohio C.P. 1956); *Cahn, New Common Law Dramshop Rule*, 9 CLEV.-MAR. L. REV. 302 (1960). Although the precise origination of this proximate cause rule denying vendor liability is uncertain, the principle can be seen as early as 1793 in *Ashley v. Harrison*, 1 Peake 194, 3 Rev. Rep. 686 (K.B. 1793), a libel action dismissed because the alleged injury was held too remote from the alleged wrongful act. Lord Kenyon stated: "If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage."

³ W. PROSSER, *THE LAW OF TORTS* § 32 (4th ed. 1971).

⁴ This principle is succinctly stated in *Meade v. Freeman*, 462 P.2d 54 (Idaho 1969),

The logical premises on which this limitation of proximate cause was based during the nineteenth century have not changed.⁵ Intoxicated persons are still legally responsible for their acts, liquor vending is still a legitimate business, and the consumption of liquor is still closer to the injury than the sale in the chain of causation. What *has* changed is the amount of damage that intoxicated persons can and do inflict on society because of the automobile, damage which in some cases exceeds in amount the ability of the intoxicated tortfeasor to compensate. This problem is especially acute in states which do not require motorists to carry liability insurance, or which permit drivers to carry unrealistically low limits on liability insurance.⁶ The tavern is a going concern, itself a valuable asset capable of generating income, and likely to carry liability insurance. A tavern would thus appear to have a "deeper pocket" than the intoxicated tortfeasor to pay a judgment. In addition, the increased danger posed to society by an intoxicated person may call for the imposition of a higher standard of care on the part of a liquor vendor, a duty to ensure that his patrons do not drink so much as to become a hazard to society.⁷ Enforcement of this duty can only be achieved by putting aside the traditional rule that the vendor's sale is a remote cause of the injury, if a tort action is to be the means of enforcement. Thus the need for vendor liability for injuries caused by intoxicated patrons is a policy issue arising from the increased danger to society which an intoxicated person behind the wheel of an automobile represents.

The policy arguments do not all favor the imposition of common law

in an opinion which is perhaps the most articulate recent statement opposing common law vendor liability.

⁵ Cf. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); in overruling the limitation of proximate cause, the court fails to address any of the premises on which proximate cause was based, but rather, relying upon policy arguments and upon statutory construction of other states' dram shop acts, concludes that other states have by court decision already abrogated the common law limitation of proximate cause.

⁶ For example, in Ohio insurance agents may refuse to underwrite a policy to a person known to drink, or who has had traffic violations. That person must then apply to the state's insurance commission to become an "assigned risk," wherein he is assigned to an insurer who must give him insurance. The insurer will only write liability insurance for him in the lowest legal amount, \$12,500/25,000—an amount obviously insufficient to cover an accident involving serious injuries. Assigned risk policies operate from a separate pool; thus the cost of insuring assigned risk drivers is not shared among all drivers, but only among assigned risk drivers. It must be said in defense of the low statutory limits on assigned risk policies that if the required limits were higher, no assigned risk driver could afford to purchase insurance, since the insurers would have to charge tremendous rates to cover claims. The alternative of placing the high risk drivers in the general pool with higher liability limits, thus requiring all motorists to pay for the cost of assigned risk drivers is generally viewed by the public as unjust to the careful motorist. See OHIO REV. CODE §§ 4509.51, 4509.70 (1973); Massar, *The Assigned Risk Plan for Allocation of Certain Insurance Risks*, 15 OHIO ST. L.J. 172 (1954).

⁷ The difficulty of articulating this duty in language which states a practical standard of conduct will be addressed later in this paper.

liability for negligence upon a vendor. The difficulty of defining the duty or standard of conduct to which the vendor is to be held, the unpredictability of the conduct of an intoxicated person, the fact that the allocation of damage costs to different classes of defendants is a policy question best left to legislative judgment, and the basic inefficiency of negligence actions in compensating injuries are factors which support the position that the proper resolution of the issue should be legislative in form.

Recently the Ohio Supreme Court in *Mason v. Roberts*⁸ examined the question whether common law vendor liability should be established in Ohio. Roger Lee Roberts entered the Corner Bar in Ashland, Ohio, during the afternoon of October 24, 1969, and purchased for consumption various intoxicating drinks until he departed the premises at one o'clock the following morning. After leaving the premises he proceeded down the street for about two blocks; where he accosted plaintiff's decedent, assaulted him, and caused fatal injuries. The owner of the Corner Bar, Dorothy Tester, was Roberts' aunt; consequently, plaintiff alleged in his complaint that defendant Dorothy Tester knew or should have known that Roberts was becoming intoxicated and that when intoxicated he tended to be violent and abusive, but that she nevertheless continued to serve him intoxicating liquors. Defendant Tester admitted in her answer that she was the owner of the Corner Bar and Roberts' aunt, denied all other allegations in the complaint, and moved for summary judgment. The trial court sustained the motion upon her affidavits showing that Roberts had not been blacklisted;⁹ however, plaintiff successfully ap-

⁸ 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

⁹ OHIO REV. CODE § 4399.01 (1973) establishes liability in tort against a tavern owner who serves intoxicating liquor to a person who had been "blacklisted" by the State:

A husband, wife, child, parent, guardian, employer, or other person injured in person, property, or means of support by an intoxicated person, or in consequence of such intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor as defined in section 4301.01 of the Revised Code to such person, has a right of action in his own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person.

The blacklisting scheme is that the wife, relative, employer, etc. of an habitual drunkard may notify the department of liquor control that the subject's name should be placed on the blacklist. A list of persons living in a particular area who have been blacklisted is then mailed to every liquor vendor in that area. OHIO REV. CODE § 4301.22(C) provides:

No intoxicating liquor shall be sold to any individual who habitually drinks intoxicating liquor to excess, or to whom the department has, after investigation, determined to prohibit the sale of such intoxicating liquor, because of cause shown by the husband, wife, father, mother, brother, sister, or other person dependent upon, or in charge of such individual, or by the mayor of any municipal corporation, or any township trustee of any township in which the individual resides. The order of the department in such case shall remain in effect until revoked by the department.

pealed, obtaining a reversal from the court of appeals.¹⁰ Confronting the Ohio Supreme Court was a case which seemed a suitable vehicle for establishing common law liability of a vendor to those injured by intoxicated patrons. Unfortunately, the law stated in the syllabus of the *Mason* opinion does not address the facts of the case; whereas the syllabus declares that there shall be a cause of action for on-premises injuries, the facts in *Mason* as pleaded clearly show that the injuries were inflicted off the premises. Furthermore, the opinion of the court shares with the syllabus the erroneous assumption that the injury was incurred on the premises. The court then found liability upon the principle that a proprietor has a duty to protect business invitees from injury on the premises. The court's holding can only be characterized as ambiguous as to whether common law vendor liability has been established in Ohio. It is the purpose of this note to examine the status of common law vendor liability in the United States, to address the policy questions which underly the issue whether or not such liability should exist, and to recommend a resolution of the *Mason* ambiguity in light of these questions of policy.

I. DEVELOPMENT OF VENDOR LIABILITY

Although the traditional common law position has been that no common law vendor liability exists for injuries to a third party by an intoxicated person, a number of states have established vendor liability by statute. These statutes, known as Civil Damage Acts, or Dram Shop Acts, were passed in the latter half of the nineteenth century, and vary in content from state to state. Generally the statutes purport to provide a right of action to a person injured by an intoxicated person against the vendor whose sale caused or contributed to the intoxication of the party causing the injury. Ohio's blacklisting provision is unusual; most statutes assign liability to a vendor who unlawfully sells liquor to an intoxicated person.¹¹ The language of these statutes indicates a concern on the part of the legislatures to protect the family of the intoxicated person from injury caused by him or from loss of support caused by the habitual intoxication of the breadwinner, although the statutes do not limit actions to family members in most cases.

¹⁰ 35 Ohio App. 2d 29, 300 N.E.2d 211 (1971).

¹¹ The Ohio statute is set forth in note 9 *supra*. A typical non-blacklist dram shop act is the NEW YORK GENERAL OBLIGATIONS LAW § 11-101 (McKinney 1964) which reads in part:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

Dram shop acts have not proven entirely satisfactory for the purpose of providing adequate compensation for injuries caused by negligent or unlawful sales of liquor. In Ohio, if the intoxicated person has not been blacklisted, the victim has no remedy under the statutes. In other states a statutory limit may be set as to maximum allowable damages which may be awarded under the dram shop act, and a short limitation of action period often appears.¹² Twenty-nine states have no dram shop act at all. These limitations have led some courts to consider recognizing a common law cause of action for such torts.

The orderly development of a common law cause of action began with two decisions issued in 1959. In *Waynick v. Chicago's Last Department Store*¹³ the United States Court of Appeals for the Seventh Circuit decided in a diversity action that a civil remedy was available against a tavernkeeper who sold liquor to an intoxicated person in violation of a criminal statute.¹⁴ The court held that civil liability was to be imposed in addition to the statutory criminal penalty of six months imprisonment and \$500 fine maximum. The court found that neither Illinois' nor Michigan's dram shop act was applicable extraterritorially, a holding that merely applied an existing rule of law in each of those states.¹⁵ Perhaps the court was moved to find a cause of action by the severity of the accident, and by the fact that plaintiff would otherwise have been without remedy solely because defendant crossed a state line. The court found a cause of action in the common law of Michigan, though the statutory duty was imposed upon defendant by the Illinois criminal statute, the breach of which was found to be the proximate cause of plaintiff's injury.

The New Jersey Supreme Court unequivocally established the common law tort of unlawfully selling liquor to minors and intoxicated persons in

¹² The Illinois dram shop act, ILL. REV. STAT. ch. 43 § 135 (Supp. 1973), has such limitations:

In no event shall the judgment or recovery under this Act for injury to the person or to the property of any person as aforesaid exceed \$15,000, and recovery under this Act for loss of means of support resulting from the death or injury of any person, as aforesaid, shall not exceed \$15,000 for each person so injured where such injury occurred prior to July 1, 1956, and not exceeding \$20,000 for each person so injured after July 1, 1956. Every action hereunder shall be barred unless commenced within one year next after the cause of action accrued.

¹³ 269 F.2d 322 (7th Cir. 1959), cert. denied sub nom. Saxner v. Waynick, 362 U.S. 903 (1960). Defendants served liquor in Illinois to persons who drove to Michigan and injured plaintiffs there.

¹⁴ ILL. REV. STAT. ch. 43 § 131 reads in part: "No licensee . . . or employee . . . shall sell . . . alcoholic liquor to any . . . intoxicated person or to any person known by him to be an habitual drunkard . . ."

¹⁵ *Eldridge v. Don Beachcomber, Inc.*, 342 Ill. App. 151, 95 N.E.2d 512, 22 A.L.R.2d 1123 (1st Dist. 1950). The supplement to the A.L.R. annotation concerning this case indicates that later cases continue to follow the rule that dram shop acts do not apply extraterritorially unless they explicitly state that they do.

Rappaport v. Nichols.¹⁶ New Jersey did not have a dram shop act. The court reasoned that in states which do have dram shop acts, the legal conclusion that an automobile accident is the proximate result of an illegal sale is not determined by statute but by common law tort principles of proximate cause and foreseeability. Therefore even in a state without a dram shop act, an automobile accident can be held to be a proximate result of an illegal sale of liquor. According to the court, this is the crucial point at which the common law rationale that injuries are caused by consumption and not by sale collapses. The effect of a dram shop act is not to establish that proximate cause may be found in the negligence of a tavern owner, but to establish strict liability for the proximate results of an illegal sale. If a dram shop act state holds that an automobile accident is a proximate result of a sale of liquor, that state has abrogated the common law rule by judicial decision, not by statute. The court supported the argument by citing two Pennsylvania cases in which the proximate cause of auto accidents is traced to a sale of liquor.¹⁷ But the Pennsylvania dram shop act (now repealed) was unique in its language; a person who wrongfully furnished liquor to a minor was liable for injuries "in consequence of such furnishing." Such language did indeed require the Pennsylvania courts to abrogate the common law rule in order to hold that a vendor would be liable to third parties. However, the New Jersey court went too far in stating that the common law rule "has in effect been rejected in decisions under Civil Damage Laws which have sustained findings that the ensuing collisions were the proximate consequences of the liquor sales."¹⁸ The Pennsylvania Civil Damage Law was the only statute under which such a finding was necessary. The more typical dram shop act supplies the causal link between vendor and consumer by statute: "A . . . person injured . . . by an intoxicated person . . . has a right of action . . . against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person."¹⁹ Such statutory language supplies the proximate cause which has traditionally been held not to exist in the common law.

Having found in the two Pennsylvania cases and in *Waynick* com-

¹⁶ 31 N.J. 188, 156 A.2d 1 (1959). Plaintiff alleged injury in an automobile collision with a car driven by Nichols, and that Nichols had been served by defendant tavern under circumstances which constituted knowledge or notice that Nichols was underage and intoxicated.

¹⁷ *Manning v. Yokas*, 389 Pa. 136, 132 A.2d 198 (1957); *McKinney v. Foster*, 391 Pa. 221, 137 A.2d 502 (1958).

¹⁸ 31 N.J. at 196, 156 A.2d at 5.

¹⁹ OHIO REV. CODE § 4399.01 (blacklisting clause omitted). Similar language is found in the New York dram shop act quoted in note 11 *supra*, and in the Illinois dram shop act, quoted in note 12 *supra*.

mon law precedent for extending the chain of proximate cause to the person selling liquor, the *Rappaport* court needed only to find a test of tortious conduct on which to base a cause of action. That test was the negligence test of whether a reasonably prudent person at the time and place should foresee an unreasonable risk or likelihood of danger or harm to others.²⁰ More specifically, the question for the jury was whether a vendor who served liquor to a visibly intoxicated person or to a minor should reasonably foresee that he was creating an unreasonable risk of danger to others. The court noted that the legislature had already indicated that such conduct created an unreasonable social risk in the case of minors, and had thus forbidden sales to minors; the New Jersey Division of Alcoholic Beverage Control had recognized a similar danger by forbidding sales to "actually or apparently intoxicated persons." Thus the jury could reasonably conclude that a tavern owner was negligent in such conduct.

The New Jersey Supreme Court in *Rappaport* had but a single legal problem to confront in establishing common law liability: whether to overrule the common law rule that proximate cause ended with the consumer. Other states having no dram shop acts could establish common law vendor liability by following *Rappaport*.²¹ Courts in states with operative dram shop acts faced a more difficult legal problem. In order to establish common law vendor liability, the courts in dram shop act states would have to overrule a general presumption that their legislatures in passing dram shop acts had intended to limit liability to the provisions of the statute, thus "pre-empting the field." Courts in states with dram shop acts which have confronted the question whether common law vendor liability coexists with statutory liability have reached widely different conclusions. Although the differences in the holdings of the courts can be partly attributed to different fact situations, it is nevertheless apparent that no single logical sequence of legal principles has emerged to support common law vendor liability in states with dram shop acts.

A New York court took a direct approach in *Berkeley v. Park*,²² noting that since the passing of the dram shop act by the legislature in 1873 no person had ever attempted a common law action in negligence against a vendor. The court noted that nothing in the statute purported to ex-

²⁰ 31 N.J. at 201, 156 A.2d at 8.

²¹ These states did so: Cal.: *Vesely v. Sager*, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151 (1971); Fla.: *Davis v. Schiappacosse*, 155 So. 2d 365 (1963); Ind.: *Elder v. Fisher*, 217 N.E.2d 847 (1966); Mass.: *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); Pa.: *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964) (after repeal of Pennsylvania's dram shop act). New Hampshire has allowed a common law cause of action by an intoxicated person for a self-inflicted injury: *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965).

²² 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

clude such an action, and that the legal rule is that the existence of a statute does not prevent an action for common law negligence.²³ Finding nothing in the statute to preclude a common law action, the court then confronted the common law rule of proximate cause, and with a tip of the hat to *Waynick* and *Rappaport*, established a common law action co-existent with the statutory action. The court recognized that the decision gave Berkeley duplicate causes of action, but said that a party should not be restricted to a single remedy when others are available, especially when the remedies differ on questions of liability and damages. Although the court did not indicate the reason behind Berkeley suing both under the dram shop act and on a negligence theory, one can speculate that Berkeley might have found it difficult to prove that the bartender had made an illegal sale (a necessary element under the New York statute),²⁴ while a negligence action required proof merely of a negligent sale.

The difficulty with such reasoning is that most negligence cases depend upon a violation of a statutory duty not to serve liquor to an intoxicated person as a basis of a recovery for negligence. The *Berkeley* court stated: "[t]he duty of the innkeeper to the public is evidenced by the fact that it is illegal to serve an intoxicated person more alcohol."²⁵ It thus seems that recovery under the New York Dram Shop Act would require fewer elements to be proved than in a negligence action. The negligence action would require a showing that the sale by the bartender was the proximate cause of the injury; the statutory action would only require a showing that the intoxicated person injured plaintiff, and that the bartender illegally served him liquor which contributed to his intoxication. The negligence action would require that the injury be reasonably foreseeable to the bartender; the statutory action would require no such test of foreseeability.

Illinois courts have also confronted the issue of common law liability in a dram shop act state. But in *Colligan v. Cousar*²⁶ an Illinois court of appeals specifically pointed out that under Illinois law the dram shop act provides the only civil remedy against a seller of intoxicating liquor. The Illinois Supreme Court had decided in 1961 that the legislature had intended the Civil Damage Act remedy to be exclusive.²⁷ The significance

²³ See W. PROSSER, THE LAW OF TORTS § 36 (4th ed. 1971).

²⁴ See note 11 *supra*.

²⁵ 47 Misc. 2d at 384, 262 N.Y.S.2d at 293.

²⁶ 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

²⁷ *Cunningham v. Brown*, 22 Ill. 2d 23, 174 N.E.2d 153 (1961). The Illinois Supreme Court said that when the dram shop act was enacted in 1872 no common law vendor liability existed, but that the legislature created liability and had carefully limited its effect and the damages available, in recognition of the statutory abrogation of common law principles.

of the *Colligan* decision is that while acknowledging the supreme court's decision, the *Colligan* court stated that a common law remedy would exist in Illinois if the dram shop act had not been enacted. A number of the commentators have cited *Colligan* as deciding that common law vendor liability exists in Illinois.²⁸ This is not true. In *Colligan* the drinker bought the liquor in Illinois, drove across the Indiana border and injured plaintiff 250 feet into Indiana territory. When plaintiff sued the vendor, the court noted that the Illinois dram shop act does not apply extraterritorially to injuries occurring in other states.²⁹ But since Indiana had not yet decided the issue of vendor liability in 1963, the Illinois court applied the rule that the common law of Indiana would be the same as the common law of Illinois. However, Illinois had a dram shop act while Indiana did not. Thus the court decided to determine what the common law of Illinois would have been if no dram shop act had existed. This speculative device eliminated the need to confront the pre-emption problem, and the court then proceeded to decide the case using the *Rappaport* rationale. Common law liability will only be imposed on an Illinois vendor by an Illinois court if the injury occurs in another state which has no dram shop act and has not decided the question of vendor liability.³⁰ There is no common law vendor liability in Illinois for an injury occurring in Illinois.

The third approach to the question of common law vendor liability in a dram shop act state is the Oregon approach, as formulated in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.³¹ The Oregon dram shop act limits the class of persons who can bring an action to the wife, husband, parent or child of the intoxicated person to whom liquor was given or sold. In a footnote the court noted the fact that the legislature provided a statutory remedy for a very limited class of plaintiffs as an indication that the legislature did not intend the act to be the sole civil remedy, citing *Berkeley* with approval.³² The court was pre-

Thus the legislature intended not to create a remedy in addition to the common law remedy, but an exclusive remedy beyond the common law and limited in scope.

²⁸ See, e.g., Case Comment, 48 NOTRE DAME LAWYER 709, 714 (1973) n. 34; Comment, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 1005 (1969) n. 60.

²⁹ Accord: *Waynick v. Chicago's Last Department Store, Inc.*, 269 F.2d 322 (7th Cir. 1959).

³⁰ Today *Colligan* would be decided under Indiana law, citing *Elder v. Fisher*, 217 N.E.2d 847 (1966), which established common law vendor liability in Indiana. In *Rubitsky v. Russo's Derby, Inc.*, 70 Ill. App. 2d 485, 216 N.E.2d 680 (2d Dist. 1966) *Colligan* was held inapplicable when the injury occurred in Wisconsin, since Wisconsin courts have held that no common law vendor liability exists. *Colligan* was further limited by *Graham v. General U. S. Grant Post No. 2665*, 97 Ill. App. 2d 139, 239 N.E.2d 856 (2d Dist. 1968), which held that if the injury occurred in another state to an Illinois resident, the Illinois dram shop act would apply and be an exclusive remedy.

³¹ 258 Ore. 632, 485 P.2d 18 (1971).

³² 258 Ore. at 638, 485 P.2d at 21, n. 2.

ented from following the New York rule established in *Berkeley* because the facts in *Wiener* did not involve a vendor, but rather a social host. A college fraternity held a picnic and served liquor to the members, some of whom were minors. After the party one of the members, a minor, was asked to furnish plaintiff, a guest at the party, a ride home in his automobile. On the way home he crashed. The plaintiff was injured, and alleged that the driver's intoxication caused the crash. Oregon's dram shop act clearly provided plaintiff no remedy. Since the dram shop act was not seen by the court as an exclusive remedy, the court found an action in negligence:

The fraternity status as host and its direct involvement in serving the liquor to Blair are sufficient to raise the duty, which we have been discussing, to refuse to serve alcohol to a guest when it would be unreasonable under the circumstances to permit him to drink. The allegations that Blair was a minor and that the fraternity ought to have known that he would be driving after the party adequately charge the existence of circumstances from which a jury might conclude that the fraternity's behavior was in fact unreasonable.³³

Although the Oregon courts have not decided a case in which a vendor's liability at common law is the issue, the language used in *Wiener* is certainly broad enough to allow the word "vendor" to be substituted for host."³⁴

One other point was made by the *Wiener* court. The court said that the statute prohibiting the giving or making available of liquor to a minor³⁵ was passed to protect the minor, and not to protect third persons from injury by an inebriated minor. The duty involved in a host liability case is thus a common law duty, not a statutory duty.

The Kentucky approach to the issue is unique in that a Kentucky court of appeals was able to find vendor liability in the absence of a dram shop act without establishing a common law cause of action. Kentucky has a statute prohibiting a sale or furnishing of liquor to a minor.³⁶ The statute is a penal statute, with fines and jail terms specified as penalties.³⁷ Kentucky also has a general civil liability statute which states: "A person

³³ 258 Ore. at 643, 485 P.2d at 23.

³⁴ Minnesota found a social host to be liable by construing its dram shop act to include all persons, not just vendors, in *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972), holding which the restrictive language of the Oregon dram shop act denied to the Oregon court. The Iowa Supreme Court also put social hosts under the old Iowa dram shop act in *Williams v. Klemesrud*, 197 N.W.2d 614 (1972). However, since the facts in that case arose, the old act was repealed and replaced by a new Civil Damage Act which limits liability to "licensees and permittees."

³⁵ ORE. REV. STAT. § 471.410(2) (1971).

³⁶ KY. REV. STAT. ANN. § 244.080 (1973).

³⁷ KY. REV. STAT. ANN. § 244.990.

injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or a forfeiture is imposed for such violation."³⁸ In *Pike v. George*⁸⁰ the court found that a package store vendor could be liable for injuries caused when the car in which plaintiff was riding crashed as a result of the driver's intoxication. The driver was a minor, as was the plaintiff and they had purchased a bottle of liquor from the defendant. Plaintiff alleged that the defendant willfully and maliciously sold the liquor to minors, knowing that they would immediately drink it and thereafter drive on public highways. The court held that the plaintiff had stated a cause of action under the general civil liability statute. Because the case had not been tried, the court refused to consider the merits or to discuss the problem of proximate cause, other than to note that the problem existed, and to indicate that a sale to a minor might create a presumption of proximate cause where a sale to an adult would not.⁴⁰ The implication which the court raises in discussing the special status given minors by the legislature is that minors have less legal responsibility than adults, and that their lack of responsibility may call for imputing their wrongful conduct to an adult who sells them liquor, or to extend the chain of proximate cause from the minors to the vendor. The court cites the attractive nuisance theory as an example of judicial recognition of the need for special protection of minors in view of their propensity to act irresponsibly.

This survey of the extent of common law vendor liability demonstrates the fact that while six states without dram shop acts have established liability, only one state having a dram shop act (New York) has also found a coexisting common law cause of action against a vendor for injuries inflicted upon a person by an intoxicated customer. On the other hand, a number of other states have considered the arguments in favor of such liability and rejected them.⁴¹ Thus it cannot be said that a sweeping trend toward common law vendor liability exists; rather, a respectable line of precedent has been established and is available for use by courts in

³⁸ KY. REV. STAT. ANN. § 446.070.

⁸⁰ 434 S.W.2d 626 (1968).

⁴⁰ 434 S.W.2d at 629.

⁴¹ See *Parsons v. Jow*, 480 P.2d 396 (Wyo. 1971) for a sampling of cases which refuse to apply *Rappaport* in their states. *McNally v. Addis*, 317 N.Y.S.2d 157 (Sup. Ct. 1970) also contains a hefty list of cases on this point. Note also that *McNally* seems to say that New York's position is unclear as to common law vendor liability; that court refused to apply *Berkeley* to the facts in *McNally*, even though the facts were sufficient to permit the court to apply *Berkeley*. The New York Court of Appeals has not yet spoken on the issue; in view of the apparent inconsistency between *Berkeley* and *McNally*, the claim that New York has adopted a common law action coexistent with its dram shop act must be considered tentative.

other states given facts in which the culpability of the vendor is particularly egregious.

II. FINDING THE ELEMENTS OF NEGLIGENCE

In order to succeed in a common law negligence action, a plaintiff must establish four elements: a duty or standard of conduct owed to the plaintiff, a breach of that duty, a causal connection between the breach and the injury, and an actual loss.⁴² From these elements arise two stubborn problems for courts considering vendor liability: the problem of duty and the problem of proximate cause, neither of which can be elegantly solved. In fact, it may have been the inability of nineteenth century courts to find a logical means of explaining duty and proximate cause in this setting which led to the common law rule that a vendor could not be liable to third parties, and to the passage of dram shop acts during that period of emphasis on logic and pattern in the law.

Today the same logical perplexities exist, yet some courts have been able, as we have seen, to circumvent the problems by shifting their viewpoint from that of a philosopher to that of a utilitarian. Instead of explaining why liability attaches, the courts may simply ask "Why not?" after establishing liability.⁴³ Finally, courts are willing to utilize such logic-stretching devices as imputed negligence and a liberally-construed doctrine of foreseeability in order to establish the negligence action.

There are several categories of people to whom a vendor may be said to owe a duty. He may owe a duty to the customer he serves, to ensure that the customer does not drink so much liquor as to impair his self-protective judgment. He may owe a duty to dependents of those customers he serves, to protect the breadwinner from a self-inflicted injury sustained while intoxicated, or illness from excessive intoxication. He may owe a duty to all patrons in his tavern as business invitees, to protect them from injury inflicted upon them by an intoxicated customer. He may owe a duty to the world at large, to prevent an intoxicated patron from inflicting damage and injuries not only within the tavern but also after leaving the tavern. Each succeeding category named above extends the duty a bit further, until the fourth and final category is reached, in which the only limitation upon duty is the doctrine of foreseeability as applied to plaintiff's relationship to defendant.⁴⁴ The clearest instance of duty is presented in a Kentucky case in which a patron boasted and wagered that he

⁴² W. PROSSER, *supra* note 3, at § 30.

⁴³ *E.g.*, *Berkeley v. Park*, 47 Misc.2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

⁴⁴ See RESTATEMENT (SECOND) OF TORTS § 281, Comment C (1965), which recognizes the rule of *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), applying the doctrine of foreseeability to the issue of duty rather than proximate cause.

could drink a quart of whiskey in one draught.⁴⁵ The bartender served the required amount, the patron won the bet but died shortly thereafter. The court held the bartender liable for serving liquor to the patron when he knew or should have known that the patron's intended act would probably result in death or serious illness. From that point the court had little difficulty in finding a cause of action in favor of the intoxicated victim's wife for loss of services and support.

New Hampshire expanded this duty to include the protection of a patron on the premises from a self-inflicted injury while intoxicated in a case in which the intoxicated patron slammed his fist on the bar, striking a glass and causing a piece of glass to sever a nerve in his hand.⁴⁶ The court therein stated that it was willing to accept *Rappaport* to the extent of allowing the intoxicated patron to recover for his own injuries.⁴⁷

A vendor's duty toward other patrons upon the premises was cited by the Ohio Supreme Court as a basis of its decision in *Mason*. This principle is stated as follows:

[A]n occupier of premises for business purposes may be subject to liability for harm caused to such a business invitee by the conduct of third persons that endangers the safety of such invitee, just as such occupier may be subject to liability for harm caused to such invitee by any dangerous condition of those premises.⁴⁸

This duty is, however, subject to a limitation of foreseeability: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur."⁴⁹

Thus, in *Taggart v. Bitzenhofer*⁵⁰ the intoxicated patron had placed a pistol on the bar and threatened several other patrons; the bartender had then served him liquor in spite of his unruly demeanor, threats, and obvious intoxication. The vendor's duty to the other patrons on the premises seems close enough to the duty quoted above to base liability upon a duty to a business invitee rather than a duty to the world at large not to serve an intoxicated person.

The broadest duty which may arise is the duty owed to the world at large not to threaten the safety of any member of the public by negli-

⁴⁵ *Nally v. Blandford*, 291 S.W.2d 832 (Ky. 1956).

⁴⁶ *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965).

⁴⁷ However, the court also stated that it saw no reason to prevent the vendor from claiming plaintiff's contributory negligence in becoming intoxicated.

⁴⁸ *Howard v. Rogers*, 19 Ohio St. 2d 42, 47, 249 N.E.2d 804, 807 (1969).

⁴⁹ *Id.*, quoting RESTATEMENT (SECOND) OF TORTS § 344 Comment f.

⁵⁰ 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973), argued on the same day as *Mason* before the Ohio Supreme Court and decided on the basis of the *Mason* decision.

gently serving liquor to an intoxicated person. This duty would thus extend to cases in which the injury is inflicted on a plaintiff after the intoxicated person leaves the premises of the tavern. This situation occurs most commonly when the intoxicated person attempts to drive an automobile after drinking and causes an accident.⁵¹ Finding a duty to protect people from the intoxicated person's conduct off the premises is much more difficult than finding a duty to protect patrons on the premises. In off-premises cases the vendor must reasonably foresee that an intoxicated patron may cause injuries to others upon leaving the premises. In other words, a vendor by serving liquor to an intoxicated patron must be perceived by the court as creating an unreasonable risk that the intoxicated patron will injure others after leaving the premises. Here the court cannot sidestep the question by using the duty to protect business invitees to establish liability,⁵² or by simply answering in the affirmative and then denying recovery because of contributory negligence or assumption of risk,⁵³ since these issues do not arise in an off-premises injury to an innocent plaintiff.

If a duty to the public at large arises, it must be because serving liquor to an intoxicated person creates an unreasonable risk to members of the public. But balancing the burden of prevention against the risk indicates that the burden is not as light as some courts seem to believe. A bartender who shuts off the tap on a significant number of his patrons out of fear of tort liability will not have a booming business for long. The primary aim of a vendor is to please his customers and thus gain their patronage. Thus the burden of prevention is heavy, especially when a jury fortified with the wisdom of hindsight sets out to decide that a vendor had a duty to cease serving a particular patron (who later commits the injurious act which prompts the jury's finding).⁵⁴ The burden may be a result of the fact that the test of the level of intoxication necessary to create liability is unknown.

If a duty to the public at large arises because serving liquor to an intoxicated person is dangerous, it must be because an intoxicated person is dangerous. Yet public policy is already established that the risk of

⁵¹ *E.g.*, *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

⁵² *E.g.*, *Taggart v. Bitzenhofer*, 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973).

⁵³ *E.g.*, *McNally v. Addis*, 317 N.Y.S.2d 157 (Sup. Ct. 1970).

⁵⁴ The foreseeability of a risk is measured not by reconstructed foresight, but by using hindsight to determine whether the results were extraordinary. *See Leposki v. Railway Express Agency, Inc.*, 297 F.2d 849 (3d Cir. 1962); *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961) (stating that hindsight replaces foreseeability as a proximate cause test); RESTATEMENT (SECOND) OF TORTS § 435.

intoxication is an acceptable risk; otherwise the sale of liquor would be prohibited.⁵⁵

Advocates of common law vendor liability argue, on the other hand, that public policy supports liability because the duty to the public has been established by a criminal statute.⁵⁶ All fifty states have statutory provisions prohibiting the sale of liquor to an intoxicated person, providing criminal penalties for a violation. Whether such statutes raise a common law duty to the public at large sufficient to establish negligence *per se* for a violation is an unsettled question. Some states consider a violation of a statute to be evidence of negligence; others consider it to raise a rebuttable presumption of negligence; and still others consider it to be negligence *per se*.⁵⁷

The Ohio common law rule is that if a statute requires a specific act for the protection of others, the failure to perform the act is negligence *per se*. But if a statute expresses a rule of conduct generally, liability must be determined by the test of due care.⁵⁸ The statute in question falls on the borderline of the test, since the required act is specified but the circumstances which require the act involve a jury consideration of whether due care was exercised in determining the degree of intoxication of the patron.

However, in Ohio the question of common law negligence based upon violation of a statute need not be confronted, since Ohio, like Kentucky, has a statute which provides for a civil recovery by anyone injured by a criminal act.⁵⁹ Thus Ohio may choose to adopt the Kentucky approach to the duty issue stated in *Pike*. The statute has the effect of establishing a legal duty toward the public at large to obey every statute for which criminal penalties may be assessed. In Ohio, the duty to refuse to sell liquor to an intoxicated person is clearly established by statute.

However, this statutory analysis does not settle the issue of proximate cause. The violation of a legal duty may be negligence, but negligence is not actionable unless the negligent act was the proximate cause of the

⁵⁵ *Meade v. Freeman*, 462 P.2d 54 (Idaho 1969); *Garcia v. Hargrove*, 176 N.W.2d 566 (Wis. 1970). These cases state that the legislature has recognized that the use of liquor is an accepted part of society, that it is not a tort to sell intoxicating liquor to a sane-bodied man, and that whatever responsibility exists for an injury falls upon the drinker.

⁵⁶ *E.g.* OHIO REV. CODE §§ 4301.22 (B), (C).

⁵⁷ 57 AM. JUR. 2d *Negligence* §§ 234, 244 (1971).

⁵⁸ *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954) syllabus #3.

⁵⁹ OHIO REV. CODE § 1.16: "Any one injured in person or property by a criminal act may recover full damages in a civil action, unless specifically excepted by law. No record of a conviction, unless obtained by confession in open court, shall be used as evidence in a civil action brought for such purposes."

injury.⁶⁰ It is the proximate cause element which has been the traditional roadblock to common law vendor liability. The vendor's sale is but a remote cause, while the patron's act of drinking is the proximate cause.⁶¹ This theory arises from the normative assumption that a person should not be able to relieve himself from legal responsibility for his acts by becoming intoxicated.⁶² Of course, it is not necessary to relieve the intoxicated person of liability in order to establish vendor liability, but the need to allow vendor liability diminishes if the intoxicated patron is liable, and since the vendor is adequately controlled by criminal penalties, the line between proximate and remote causation seems to be conveniently drawn between consumer and vendor.

The remoteness of the sale as causation can also be seen in applying the "but for" test of proximate cause: "the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm could have been sustained even if the actor had not been negligent."⁶³ Assume hypothetically that *A* enters a tavern and purchases and consumes a number of drinks. At a certain point *B*, the bartender, notices that *A* is visibly intoxicated. If *B* refuses to serve *A* another drink, and *A* thereupon departs from the premises, *A* is still visibly intoxicated and likely to constitute a social threat. The vendor's duty to refuse service does not arise until the patron has already become visibly intoxicated. Now assume instead that *B* serves *A* a drink after *A* has become visibly intoxicated. *A*, after leaving the tavern, injures *C*. Can it be said that "but for" the drink served after *A* had become visibly intoxicated, the injury to *C* would not have occurred?

Those courts which have determined that a sale is the proximate cause have done so on the foreseeability test: if the vendor could reasonably foresee that his conduct would create an unacceptable risk of injury to someone, his conduct would be deemed a proximate cause of any injury falling within the scope of the risk. Nor would the patron's consumption constitute an intervening cause of such extraordinary import as to relieve the vendor from responsibility for proximate causation, when viewed in the white light of hindsight.⁶⁴

The question of proximate cause is not really an issue filled with clashes of legal principles, but is rather a simple question of judgment. For example, an obviously inebriated man drives his car up to a carry-out,

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 430; *Cincinnati Street Ry. Co. v. Murray*, 53 Ohio St. 570, 42 N.E. 596 (1895) syllabus #3.

⁶¹ See note 2 *supra*.

⁶² W. PROSSER, *supra* note 3, at § 32.

⁶³ RESTATEMENT (SECOND) OF TORTS § 432(1).

⁶⁴ See note 54 *supra*.

throws out an empty bottle, enters the carry-out, and says he needs a refill. Or a man enters a tavern, lays a gun on the bar, and says "I need a couple of drinks before I shoot Joe." These are relatively easy cases in which to find a duty and proximate cause based upon foreseeability.⁶⁵ Not so simple is the more usual circumstance in which a regular patron of a tavern causes an automobile crash, injuring another party who sues the tavern owner, or in which the patron leaves the tavern and gets into a fight down the street. Should the vendor be required to foresee these consequences? Are all injuries caused by drunkenness deemed foreseeable merely because drunkenness may result in unpredictable conduct?⁶⁶

It is probable that one of the major reasons courts have been hesitant to permit common law vendor liability is the difficulty in determining the level of intoxication required to subject the vendor to liability. At what level of intoxication should the vendor realize that the next drink will create an unreasonable risk? The traffic laws state that a driver is dangerous when his blood alcohol level exceeds .10 percent.⁶⁷ Yet this level is not easily detectable in many people by mere observation. A vendor would have to require each patron to puff into a breathalyzer before each round, or to walk a line painted on the floor of the bar to meet such a standard of responsibility. The theory behind the dram shop acts appears to be that at a certain level of intoxication a person loses the ability to refuse the next drink, and that further drinking should thus be blamed on the vendor. But the point at which the patron loses his judgment, or his ability to recognize his own limitations, is even less obvious to the vendor than the patron. Furthermore, neither the common law states nor the dram shop acts have been able to define satisfactorily the test for a court's determination that the vendor should have refused service. Is the "visibly intoxicated" test practicable? Would it not be a legitimate complaint for a vendor to say: "Most of the people in my place look like they've had a few; am I supposed to throw them all out?"

Ohio's blacklisting scheme is an obvious attempt to avoid the uncertainty of common law liability by providing an absolutely certain test: if the patron's name appears on the blacklist sent to each tavern by the

⁶⁵ In fact, the companion case to *Mason* argued before the Ohio Supreme Court on the same day and decided on the basis of *Mason* did involve a patron brandishing a pistol and threatening other customers. Was the court moved to decide *Mason* as they did because of the facts in *Taggart*? Did the court confuse the facts in the two cases, resulting in a syllabus proclaiming liability for on-premises injury in a case in which the injury occurred off the premises?

⁶⁶ See *Meade v. Freeman*, 462 P.2d 54, 60 (Idaho 1969), in which the court suggests that some judges are "... unable to disentrall themselves of the lurking suspicion that liquor in and of itself is evil."

⁶⁷ OHIO REV. CODE § 4511.19(B) (1973).

Department of Liquor Control, he cannot be served at all, and the vendor is liable in tort for any injuries arising from the ensuing intoxication. The burden of complying with this statute is as simple as discovering the identity of each patron—it is no burden at all as to regular customers. However, the utility of the statute in eliminating uncertainty is only realized if the statute is deemed to pre-empt the field of vendor liability. Finding a common law cause of action coexistent with the blacklisting statute would not only introduce the uncertainty which the blacklist prevents, but also renders the blacklist statute an unneeded device.

In *Robinson v. Stilgenbauer*⁶⁸ the court indicated that it might be willing to find liability if the person served were a known habitual drunkard, even if the person had not been blacklisted.⁶⁹ The willingness of the court to do so may be attributed to the fact that the foreseeability test of negligence would be much easier to administer if the vendor could be said to have known that a particular patron tends to drink excessively and becomes dangerous when drunk. The burden on the vendor would not be so heavy in such a case, although this holding would render the blacklisting statute obsolete, since blacklisting would then arise from reputation rather than administrative action.

Although the blacklisting statute was passed at a time when a negligence action against a vendor by a third party was universally denied, thus showing legislative intent to restrict civil actions to injuries caused by blacklisted persons, the apparent willingness of the Ohio Supreme Court to find liability in other situations may be explained by the fact that the blacklisting statute does not work very well. Presently the blacklist contains only 500 names, many of which have remained on the list for a long period of time, since the Department of Liquor Control has no procedure for removing a name from the list. The Department receives only one or two requests for listing each week. The Department is not adding names to the list at this time because the recent United States Supreme Court decision of *Wisconsin v. Constantineau*⁷⁰ makes the procedure whereby people have been blacklisted without notice and a hearing unconstitutional. Although complying with *Constantineau* will require merely a change in Departmental procedure, the larger infirmities of the statute will remain. Apparently few people are willing to turn in the names of husbands, relatives, friends, or constituents for blacklisting. Reported cases concerning blacklist actions are few in number, especially in

⁶⁸ 14 Ohio St. 2d 165, 237 N.E.2d 136 (1968).

⁶⁹ Plaintiff had conceded upon defendant's motion for summary judgment that the patron had not been blacklisted, but plaintiff had alleged in the complaint that the patron was a known habitual drunkard.

⁷⁰ 400 U.S. 433 (1971).

comparison with states which have more liberal dram shop acts. Although the paucity of suits under the blacklist statute may be attributable to the effectiveness of the act, in that bartenders in Ohio never serve to blacklisted people, it is more likely that so few persons are blacklisted that virtually none of the injuries caused in Ohio by intoxicated persons are actionable under the statute.

The expansion of the blacklisting statute or the establishment of common law vendor liability in Ohio are developments not necessarily required by the present paucity of lawsuits against vendors. The controlling question, of course, is whether more such lawsuits are socially desirable. This is a question of policy for which two affirmative arguments can be presented. First, establishing liability would deter vendors from selling to intoxicated persons. Second, compensation would be available from a more solid financial entity (the tavern) than just the drunkard himself.

The deterrence argument seems to have little force. Already in the Ohio Revised Code is a criminal provision providing for a maximum six month jail term and \$300 fine, plus loss of license, to any vendor who sells to an intoxicated person.⁷¹ The addition of tort liability would seem to offer minimal additional deterrence, especially with insurance available. On the other hand, permitting a common law civil action may be the best means of enforcing the prohibition against serving intoxicated persons. Few taverns lose licenses for serving intoxicated persons, yet heavily intoxicated people are not uncommon occurrences. The prohibitory statute, like the common law civil action, suffers from a serious problem of vagueness in interpretation, and police are reluctant to second-guess the vendor's judgment of who is intoxicated within the meaning of the statute. The seeming reluctance of the state to enforce the penal provisions might indicate that allowing the civil action would indeed add deterrence to the present system.

The compensation argument is stronger. If tort liability were such that every vendor would feel insurance necessary, compensation would be assured to those injured by senselessly intoxicated persons. Furthermore, the costs of damages and injuries caused by intoxication would be borne equally by those who drink—the customers of the tavern—since the cost of insurance would be reflected in the price of drinks. The negative side of compensation also exists—using negligence lawsuits is an inefficient method of compensation, since a large slice of the recovery must pay attorney fees, and since a plaintiff would still have the difficult task of proving that the vendor was negligent.⁷²

⁷¹ OHIO REV. CODE §§ 4301.22, 4301.25, 4301.99.

⁷² Note that most dram shop acts eliminate the necessity of proving vendor negligence, though specifying narrow circumstances in which the vendor may not serve a patron.

III. CONCLUSION

The greatest attribute of the negligence form of action in tort law is that it is flexible; it operates to settle grievances in many different fact settings, and is always available to provide redress for injuries suffered in situations never before encountered by the law. But in factual settings in which the same relationships, duties and dangers are commonly confronted and in which patterns of behavior are predictable from experience, the negligence action suffers from a lack of efficiency. Thus in the areas of industrial accidents and (recently) automobile accidents, the trend away from the inefficiencies of negligence actions is apparent.

Liquor control has since the repeal of Prohibition been a highly regulated field. An entire chapter of the Ohio Revised Code is devoted to liquor control, and a state agency is charged solely with enforcing the liquor control laws. The liquor control statutes are sufficiently detailed that the vendor is even told what size sign he may place in the window of his tavern, and how the taps on his beer kegs are to be labelled. The courts are not entering a legislative void when considering common law vendor liability. In a matter which involves so many policy questions the legislature is much better equipped than the courts to determine the need for vendor liability.⁷³

⁷³ The Idaho Supreme Court in *Meade v. Freeman*, 462 P.2d 54, 59-60 (1969) said: We believe that if liability, as sought by appellants here, is to be established it should be done forthrightly by the legislature in the form of a dram shop act, rather than by judicial construction

....
We are being asked to single out a particular type of business, which in every other aspect is legitimate and respectable, for the imposition of a liability otherwise unknown in the law. This, for the purpose of alleviating a major social ill in this country, that of mixing the two ingredients—alcohol and automobile. If such is to be done, it should be done by the legislature wherein all of the policy considerations can and should be carefully weighed and from which, perchance, liability of the type sought here will become a reality with the enactment of a dram shop act.

The brief for Appellee in *Mason* (p. 19) argues that liquor vendors are in fact relieved from responsibility for injuries caused by their sales, while other vendors must assume such responsibility. But liquor vendor cases are *not* product liability cases. Product liability negligence would arise against a liquor vendor if he were to sell liquor which was contaminated or unreasonably capable of injury, taking into account the fact that the sale of liquor is not unreasonably dangerous *per se*.

Judge Rutherford in dissenting from the Court of Appeals decision in *Mason* noted that:

Certainly the common law need not remain static. It arose from court decisions and although courts should be reluctant to depart from rules which have been long-standing it is within their province, *when change has not been controlled by legislative enactment*, to change such law if change is necessary to meet changing conditions of society.

Where there has been a legislative enactment, the courts have generally held that the extent and condition of civil liability are clearly within the power of the creator, the legislature, with the only exception being where injury has resulted from a willful and intentional tort.

Appellant's brief in *Mason* suggests that the legislature is the proper body to establish vendor liability and suggests several means of establishing such liability.⁷⁴ The most practical of his suggestions is that the vendor be held secondarily liable for uncompensated injuries after a recovery has been obtained from the intoxicated person. Appellant also suggests that the New York dram shop act provides a good model for establishing a broader range of liability. Unquestionably, a modern dram shop act, if deemed necessary by the legislature, should include (1) strict liability for injuries caused by intoxication arising from an illegal sale (as in New York), thus eliminating proximate cause problems; (2) a provision establishing strict liability for sale to a known drunkard (a more flexible substitute for the blacklisting scheme presently existing) with specific tests for establishing the identity of such persons before the sale; and (3) mandatory liability insurance for all taverns in such amount as to ensure full compensation to injured parties.

Today in Ohio a vendor is liable for on-premises injuries because of his duty to protect business invitees. The *Mason* case was decided on the basis of that doctrine in spite of the fact that the injury occurred off the premises. Because the syllabus in that case discusses on-premises liability only, it can be said that the Ohio Supreme Court has not yet established off-premises liability. Hopefully the *Mason* case will be appealed again after trial to allow the Court to clear up the conflict between the facts and the syllabus in the case. Hopefully the legislature will also reconsider the present state of dram shop liability and by legislative action provide the court with a fresh statement of intent as to the need for vendor liability.

Robert Conley Kahl

⁷⁴ Brief for Appellant at 24.